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IN THE
COURT OF APPEALS OF INDIANA

JACOB REED,	)	
	)	
Appellant-Defendant.	)	
	)	
vs.	)	No. 49A02-0104-CR-240
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
The Honorable Alex R. Murphy, Master Commissioner
Cause No. 49G01-9903-CF-47002

February 13, 2002

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROOK, Chief Judge

Case Summary[1]

Appellant-defendant Jacob Reed ("Reed") appeals his conviction and sentence for battery,[2] a Class C felony. We affirm.

Issues

Reed presents seven issues for review, which we consolidate and restate as follows:

I. whether the State presented sufficient evidence to rebut Reed's self-defense claim;

II. whether persons under the legal drinking age should be permitted to assert a voluntary intoxication defense;

III. whether the trial court abused its discretion in admitting evidence regarding two firearms;

IV. whether the trial court abused its discretion in admitting unauthenticated documents at the sentencing hearing;

V. whether the trial court abused its discretion in granting the State's motion to quash Reed's subpoena to the victim to testify at the sentencing hearing; and

VI. whether the trial court abused its discretion in imposing the presumptive sentence.

Facts and Procedural History

The relevant facts most favorable to the conviction indicate that on the afternoon of March 17, 1999, nineteen-year-old Jacob Reed ("Reed") and several friends, including Seamus Morrissey ("Morrissey"), Michael Stokes ("Stokes"), and Joe Surry ("Surry"),

[1] We heard oral argument in this case at Delphi High School in Delphi, Indiana, on January 22, 2002. We extend our sincere appreciation to Norm Miller and the faculty, staff, and students at Delphi High School for their enthusiasm and hospitality and to counsel for their capable appellate advocacy.

[2] IND. CODE § 35-42-2-1.

attended a St. Patrick's Day party at the Rathskeller Restaurant in Indianapolis, Indiana. Reed and his friends stayed at the Rathskeller for five or six hours, eating and drinking alcoholic beverages. While at the Rathskeller, Reed consumed approximately ten to fifteen "pints" of beer. The group then left the Rathskeller for Morrissey's apartment, where Reed consumed another "two or three" beers.

Shortly thereafter, Reed, Morrissey, Stokes, and Surry returned to the Rathskeller and sat at a table, where Reed consumed an additional five "pints" of beer. Approximately one hour later, patrons at a nearby table began making derogatory comments about Morrissey's soccer shirt. A verbal argument ensued, and Reed hit one of the patrons. The owner of the Rathskeller, Dan McMichael ("McMichael") asked both parties to leave, and two restaurant employees escorted Reed and Stokes upstairs and out of the restaurant.

When Reed and Stokes realized that Morrissey had not followed them, they re-entered the Rathskeller and stopped behind Morrissey, who was backing up the stairs leading to the exit. McMichael again ordered Reed to leave. Reed threatened to kill McMichael and unsheathed a knife attached to his belt. Thinking that Reed "was trying to go for somebody," Rathskeller patron Derek Osgood ("Osgood")[3] rushed up the stairs and punched Reed in the head. Osgood and Reed fell against the exit door and wrestled on the ground. Reed landed on top of Osgood and stabbed him in the right side of the chest, puncturing a lung. Morrissey kicked Osgood's head and torso. Osgood screamed, and a restaurant employee pulled Reed away from Osgood. As Reed, Morrissey, and Stokes attempted to enter Morrissey's car,

[3] The record indicates that Osgood had not been involved in the earlier altercation and that he had consumed approximately nine or ten beers and one glass of wine at the Rathskeller.

McMichael appeared in the parking lot with a shotgun and told the men not to leave. The police arrived shortly thereafter.

On March 19, 1999, the State charged Reed with attempted murder and Class C felony battery. On August 30, 2000, Reed waived his right to jury trial. On February 15, 2001, the trial court found Reed not guilty of attempted murder and guilty of battery. Reed subpoenaed Osgood to testify at the sentencing hearing. On April 2, 2001, the State filed a motion to quash Reed's subpoena, which the trial court granted. On April 12, 2001, the trial court sentenced Reed to four years' imprisonment. Reed now appeals.

Discussion and Decision[4]

I. Self-Defense Claim

The crux of Reed's first argument is that the State failed to present sufficient evidence to rebut his self-defense claim. "'The standard of review for a challenge to the sufficiency of the evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim.'" *Brown v. State*, 738 N.E.2d 271, 273 (Ind. 2000) (citation omitted). In reviewing Reed's sufficiency claim, we neither reweigh evidence nor assess witness credibility. *See id.* We consider the evidence most favorable to the judgment and reasonable inferences drawn therefrom. *See id.* We will affirm the conviction if evidence of probative

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[4] In addressing three of the seven issues presented in his appellate brief, Reed summarily claims violations of "the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve, Thirteen, and Nineteen of the Indiana Constitution." Appellant's Brief at 8, 15, 17-18. By mentioning these alleged violations only in passing, Reed has waived their consideration on appeal. *See Coleman v. State*, 558 N.E.2d 1059, 1062 n.2 (Ind. 1990) (waiving appellant's state constitutional argument for lack of substantive argument), *cert. denied*, 501 U.S. 1259 (1991).

value exists from which a reasonable factfinder could find Reed guilty beyond a reasonable doubt. *See id*.

"A valid claim of self-defense is a legal justification for an otherwise criminal act." *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). Indiana Code Section 35-41-3-2(a) provides that "[a] person is justified in using reasonable force against another person to protect himself … from what he reasonably believes to be the imminent use of unlawful force." "For a claim of self-defense to prevail, the defendant must demonstrate that he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm." *Hollowell,* 707 N.E.2d at 1021. "[O]nce a defendant claims self-defense, the State bears the burden of disproving at least one of the elements beyond a reasonable doubt. The State may meet its burden of proof by 'rebutting the defense directly, by affirmatively showing that the defendant did not act in self defense, or by simply relying upon the sufficiency of its evidence in chief.'" *Brown*, 738 N.E.2d at 273 (citation omitted). "The amount of force used to protect oneself must be proportionate to the urgency of the situation. 'Where a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator.'" *Hollowell*, 707 N.E.2d at 1021 (citations omitted).

We first observe that Reed re-entered the Rathskeller after being told to leave and therefore was not in a place where he had a right to be. At trial, Reed attempted to portray Osgood as the initial aggressor and offered the following testimony regarding Osgood's blow to his head:

Q. How did you feel when you got hit in the back of your head?
A. I – I felt threatened. I felt like I was, you know, somebody was trying to fight me – somebody was trying to beat me up.
Q. Did you feel in fear for your safety?
A. Yes.

Transcript of Evidence at 257. Regardless of whether Reed initiated his scuffle with Osgood, his fear of being "beat[en] up" falls short of the requisite reasonable fear of death or great bodily harm. Moreover, Reed's use of a knife to protect himself from Osgood's fists was disproportionate to the urgency of the situation. In summary, the State presented sufficient evidence to rebut Reed's self-defense claim.

II. Intoxication Defense

Reed presented evidence of his intoxication at trial and argues as a matter of first impression that "public policy supports that intoxication should be a defense in the law when it involves a defendant who is under the drinking age who was served excessive amounts of alcohol by an establishment with a liquor license." Appellant's Brief at 11.

Indiana Code Section 35-41-2-5 provides that "[i]ntoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5." Indiana Code Section 35-41-3-5 provides that "[i]t is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without his consent; or (2) when he did not know that the substance might cause intoxication."

The State responds that not only did Reed fail to establish that he became intoxicated without his consent or that he did not know that the beers he ingested might cause intoxication, but he also failed to present his voluntary intoxication argument to the trial court and has thereby waived its consideration on appeal. Generally, "[a]n issue cannot be raised for the first time on appeal." *McClendon v. State*, 671 N.E.2d 486, 489 (Ind. Ct. App. 1996). We briefly address Reed's argument, however, for the limited purpose of directing it to the proper branch of government.

Reed frames the legal portion of his voluntary intoxication argument as follows:

> The Indiana legislature has recognized a special class of persons when it adopted legislation which prohibits an individual under the age of 21 [from consuming] alcohol. Reed argues that this recognition by the legislature should afford him the opportunity to negate the *mens rea* element through proof of his voluntary intoxication. Reed does not argue that his status of being under age 21 causes him to have been involuntarily intoxicated. Rather, he urges the courts to recognize his special age class standing, as the legislature has, and to provide him with added constitutional protection.
>
> Nor does Reed argue that all person[s] under age 21 who drink and commit crimes will be shielded from criminal liability. Those persons will merely be afforded a defense in the law not available to adults who commit crimes while intoxicated. Whether they meet their burden of proof on that defense is another matter.

Appellant's Brief at 12.

In *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001), a majority of our supreme court interpreted section 35-41-2-5 as "redefin[ing] the requirement of mens rea to include voluntary intoxication, in addition to the traditional mental states, i.e., intentionally, knowingly, and recklessly. Thus, evidence of voluntary intoxication does not negate the mens rea requirement …. Rather, it satisfies this element of the crime." *Id*. at 520. The *Sanchez* majority further stated that with respect to a defendant's right to present a defense

under Article I, Section 13 of the Indiana Constitution, section 35-41-2-5 renders voluntary intoxication evidence irrelevant and thus does not run afoul of this constitutional provision. *See id*. at 521.

With respect to the constitutionality of section 35-41-2-5 under Indiana's privileges and immunities clause, the *Sanchez* majority stated,

> The first inquiry under Article I, Section 23 is whether the statute is reasonably related to the inherent characteristics that define the classes. This statute classifies persons into three groups: (1) those not intoxicated, (2) those voluntarily intoxicated, and (3) those involuntarily intoxicated. As for the second of these, Indiana Code section 35-41-2-5 reflects the legislative determination that defendants who are voluntarily intoxicated are responsible for their resulting actions, but recognizes that individuals who become intoxicated through no fault of their own are not to be held responsible for actions taken while intoxicated. This is a permissible legislative judgment. This distinction between voluntarily and involuntarily intoxicated defendants is rationally related to legislative goals and is a permissible balancing of the competing interests involved. The differentiation of the voluntarily intoxicated from those who lack mens rea for reasons other than self-induced drunkenness is also rational. The former voluntarily placed themselves in a mode to be harmful to others, and the latter did not.
>
> Section 23 also requires that the preferential treatment provided by the legislation be uniformly applicable to all similarly situated persons. On its face, the voluntary intoxication statute applies to everyone. Sanchez is treated no differently from any other person who is voluntarily intoxicated when he or she commits a crime.

Id. at 521-22.

Reed urges us to create *sua sponte* a fourth class of persons: those voluntarily intoxicated under the legal drinking age of twenty-one. The creation of this proposed class is properly a matter for the legislature, not the courts. Just as it is the legislature's prerogative to establish the age at which a person may legally consume alcoholic beverages, so it is the legislature's prerogative to determine whether to redefine the mens rea requirement for

persons under the legal drinking age who commit crimes while voluntarily intoxicated. We therefore decline to address Reed's argument further.

III. Admission of Firearms Evidence

Reed next contends that the trial court erred in admitting evidence regarding McMichael's shotgun and a handgun owned by Stokes,[5] claiming that such evidence was irrelevant, prejudicial, and had no probative value. As the State correctly observes, however, Reed objected only to the admission of a photograph of the shotgun and the handgun and failed to object to testimony regarding these firearms. "Even if the trial court erroneously admitted the testimony, erroneous admission of evidence is not reversible error when evidence of the same probative value was admitted without objection." *Grace v. State*, 731 N.E.2d 442, 444 (Ind. 2000).

Furthermore, when a defendant is tried to the bench, we generally presume that the trial court considers only relevant and probative evidence in reaching its decision. *See Birdsong v. State*, 685 N.E.2d 42, 47 (Ind. 1997). "We presume that evidence, which might be inadmissible and prejudicial when placed before a jury, is disregarded by the court when making its decision. Unless the defendant presents evidence to the contrary, we presume no prejudice." *Id*. (citations omitted). Finally, "[e]rrors in admitting evidence are to be disregarded as harmless error unless they affect the substantial rights of a party." *Hughley v.*

[5] Reed frames his argument regarding the handgun testimony in terms of prosecutorial misconduct but fails to mention the relevant standard of review or offer any cogent reasoning in contravention of Indiana Appellate Rule 46(A)(8)(a) and (b). He has therefore waived consideration of this argument. *See Pratt v. State*, 744 N.E.2d 434, 436 n.2 (Ind. 2001) (finding waiver for lack of cogent argument). Waiver notwithstanding, we review Reed's claim as a general admissibility challenge; although the prosecutor did refer to Stokes's handgun, as Reed claims, the prosecutor did so in the process of eliciting testimony about the firearm.

State, 737 N.E.2d 420, 424 (Ind. Ct. App. 2000) (citing, *inter alia*, Ind. Trial Rule 61), *trans. denied*. "If the State presents evidence of guilt that is overwhelming and independent of the challenged evidence, the error is harmless and reversal is not warranted." *Id.* Here, the State presented overwhelming evidence that Reed knowingly stabbed Osgood in the chest with a knife, resulting in serious bodily injury. *See* IND. CODE § 35-42-2-1 (defining battery); *see also* Appellant's Appendix at 27 (charging information). There is no reversible error.

IV. Admission of Unauthenticated Documents

At the sentencing hearing, Reed objected to portions of the presentence investigation report and to attached documents relating to his juvenile record in New Hampshire and his home state of Vermont; Reed moved to strike portions thereof on the basis of lack of authentication, hearsay, and false or omitted information. The trial court denied Reed's motion to strike but stated that it would "give proper weight, and consideration to the areas that [Reed] ha[d] brought some new light to." Transcript of Evidence at 300. The trial court later stated,

> Maybe I could – maybe I could settle your minds, both of you, at the [*sic*] time. There are some serious innuendos in the presentence investigation about concerns that were relayed to the Probation Department of possibly involving this defendant. But, I am resolving those issues as just as they have been, innuendos. And I can state for you that those will not have a bearing on … my final decision from the trial.

Id. at 341.

Reed argues that the trial court abused its discretion in admitting "the records from another state which were not self-authenticating pursuant to Ind. Code § 34-39-4-3[6] or Ind.

[6] Indiana Code Section 34-39-4-3 reads as follows:

Trial Rule 44(A)."[7] Appellant's Brief at 16. Reed also cites to Indiana Evidence Rules 901(a) and 902 with respect to document authentication; as the State correctly observes, the rules of evidence do not apply in sentencing proceedings. *See* Ind. Evidence Rule 101(c)(2); *see also Shields v. State*, 699 N.E.2d 636, 41 (Ind. 1998) (citing Evid. R. 101(c)(2)). We note, however, that the State offers no authority for its assertion that unauthenticated out-of-state documents are admissible at sentencing proceedings.

"The decision to admit evidence is within the sound discretion of the trial court and is afforded a great deal of deference on appeal." *Bacher v. State*, 686 N.E.2d 791, 793 (Ind. 1997). "To constitute grounds for reversal, an error in the admission of evidence must be 'inconsistent with substantial justice.'" *Bowles v. State*, 737 N.E.2d 1150, 1154 (Ind. 2000) (quoting Ind. Trial Rule 61). Reed claims that the trial court "directly relied upon one of the

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> (a) The records and judicial proceedings of the several courts of record of or within the United States or the territories of the United States shall be admitted in Indiana courts as evidence when authenticated by attestation or certificate of the clerk or prothonotary, with the seal of the court annexed, together with the seal of the chief justice or one (1) or more of the judges, or the presiding magistrate of the court, that:
>
> (1) the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court; and
>
> (2) the attestation is in due form of law.
>
> (b) Records and judicial proceedings that have been authenticated as described in subsection (a) shall have full faith and credit given to them in any court in Indiana as by law or usage they have in the courts in which they originated.

[7] Indiana Trial Rule 44(A) reads in relevant part as follows:

> An official record kept within the United States, or any state … or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

uncertified documents in arriving at its sentencing decision." Appellant's Brief at 15. The trial court did refer to an "in-field police report" in finding Reed's prior criminal history to be an aggravating circumstance. *See* Transcript of Evidence at 366-67; *see also* Appellant's Appendix at 82 (presentence investigation report indicating that Reed was "convicted of Criminal Threatening, a misdemeanor offense, for threatening a man with a knife" in New Hampshire). The record contains neither an authenticated judgment of conviction for this misdemeanor nor an authenticated criminal record.

Under the circumstances, however, we must conclude that any error in the trial court's admission of these unauthenticated documents was harmless beyond a reasonable doubt. The trial court relied on the contested documents only with respect to one aggravating circumstance: Reed's criminal history. As we discuss below, the remaining aggravators are themselves sufficient to support Reed's presumptive four-year sentence, and thus we find no reversible error here.

V. Sentencing – Motion to Quash Subpoena

As previously mentioned, Reed subpoenaed Osgood to testify at the sentencing hearing. The State filed a motion to quash, which the trial court granted after conducting a conference call with counsel the day before the sentencing hearing.[8] Osgood did not appear

[8] At the sentencing hearing on April 12, 2001, the trial judge noted for the record that he "was not here the week of April 2nd," when Reed filed his subpoena and the State filed its motion to quash:

at the hearing,[9] and the State read into the record, over Reed's objection, an e-mailed impact statement from Osgood addressed to Reed. Reed contends that he "was entitled to call witnesses and to present evidence at his sentencing hearing" and should have been permitted to cross-examine Osgood "on matters concerning mitigating factors for purposes of sentencing." Appellant's Brief at 18.

However, Reed fails even to mention the statute governing his right to subpoena witnesses to appear at the sentencing hearing. *See* IND. CODE § 35-38-1-3 ("Before sentencing a person for a felony, the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and to present information in his own behalf."). Both at the sentencing hearing and on appeal, Reed has premised his argument on Article I, Section 13(b) of the Indiana Constitution, which provides in relevant part that crime victims have the right "to be informed of and present during public hearings." At the sentencing hearing, Reed attempted to equate this right with a so-called Fifth Amendment "negative right which should be treated

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> And the Motion To Quash was pending until the 10th of April. That was two days ago …. I – as soon as I was made aware of it, I got the file, and – and knew we wouldn't be able to schedule a hearing on that. And was yesterday able to get both counsel for the State … and counsel for the defense … on the phone in a conference call, and provided both lawyers with an opportunity to state what they thought were pertinent issues.… But, based upon these considerations, recognizing that a person has a – a statutory right to have witnesses present to assist him at a sentencing – contravened with the interest of the victim in this matter, who the record should reflect, was deposed prior to the trial, and was, obviously, at the trial, and testified. I made a ruling that the right to call witnesses in one's behalf does not necessarily include the victim in the case.

Transcript of Evidence at 301-02.

differently than an affirmative right"; in other words, one "can't infer that the victim has a right not to be present just because he has a right to be present." Transcript of Evidence at 310-11. Reed "stands upon" this unsupported argument in his appellate brief.

We first observe that Reed does not have standing to challenge any violation of Osgood's constitutional right to be present at the sentencing hearing. *See, e.g., Kirkland v. State*, 249 Ind. 305, 308, 249 Ind. 365, 366 (1968) (addressing appellant's challenge to search of third party's automobile; "Constitutional rights are personal to an individual, and violation of a third party's constitutional rights cannot be claimed by a defendant in a trial."). Moreover, Reed offers no constitutional basis for his statutory right to "subpoena and call witnesses" for sentencing purposes under section 35-38-1-3. *Cf.* IND. CONST. art. I, § 13(a) (granting accused the right "to have compulsory process for obtaining witnesses in his favor" in "all criminal *prosecutions*") (emphasis added). At the time of sentencing, Reed had already been prosecuted for and convicted of battery.

Regarding the trial court's exclusion of Osgood's testimony, the State directs us to the following considerations in *Rabadi v. State*, 541 N.E.2d 271 (Ind. 1989):

> The laws concerning felony sentencing provide that the court must conduct a hearing "to consider the facts and circumstances relevant to sentencing," and appellant is entitled to "call witnesses and to present information in his own behalf." I.C. 35-38-1-3. It goes without saying that such information must be relevant to the considerations of sentencing and would not include facts concerning a defendant's innocence which is the focus of the trial process. The sentencing scheme and considerations delineated by I.C. 35-38-1-7 [now 35-38-1-7.1] indicate that the focus of the court's inquiry at sentencing is on

[9] Reed's counsel stated that her paralegal had spoken with Osgood, who stated "that he didn't want to come [to the sentencing hearing] today, not because it was an inconvenience, or not because he was supposed to be here on behalf of the defendant what – because it was his birthday, and he was off work, and he didn't want to come because it was his birthday." Transcript of Evidence at 304.

> the nature and seriousness of the crime, the defendant's character and history and the impact of the crime on the victim. The admission of testimony at the hearing is at the discretion of the court. *Jones v. State* (1981), Ind., 422 N.E.2d 1197.

Id. at 277.

Two of Reed's stated reasons for subpoenaing Osgood relate to Osgood's civil suit against the Athenaeum Foundation and the "potential for bias" in his trial testimony,[10] neither of which are relevant to the considerations enumerated in *Rabadi* and section 35-38-1-7.1. The remaining reasons, namely Osgood's forgiveness of Reed and his desire not to see Reed receive a lengthy sentence, are addressed in Osgood's impact statement,[11] the admissibility of

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[10] At the sentencing hearing, in the form of an offer of proof, Reed's counsel stated that Osgood would have testified regarding the following "mitigating evidence":

> Derrick [*sic*] Osgood, if he were here today, would testify, likely, that he would not want to see the defendant go to prison for any length of time, or any lengthy time, and also that he's forgiven the defendant. Also, Derrick [*sic*] Osgood would testify as – as to the following mitiga – mitigating evidence; and that is that he is seeking a civil judgment … against the Athenaeum Foundation for the injuries he sustained on the night of the incident for this offense for which defendant was convicted.

Transcript of Evidence at 303-04. Reed's counsel later recharacterized Osgood's proffered testimony as follows:

> One being that [Osgood] did not sue Mr. Reed civilly. Why? Because Mr. Osgood doesn't feel Mr. Reed is responsible. Mr. Reed was being served a tremendous amount of alcohol at a young age. Mr. Reed is an alcoholic, and Mr. Osgood, instead, sued the Athene – Athenaeum Foundation, the truly responsible party which is tremendously mitigating for purposes of sentencing. Additionally, I would like, and the defendant would like to cross-examine Mr. Osgood within the context of this newly-discovered evidence of his civil suit regarding his potential for bias in his testimony. Although we're not – we're not trying to retry the case, we feel that that provides mitigating evidence for – for purpose of sentencing alone.

Id. at 311-12. The Athenaeum Foundation's legal relationship to the Rathskeller is not explained in the record.

[11] Osgood's impact statement reads in relevant part as follows:

which Reed does not specifically challenge on appeal. Thus, any error in the trial court's exclusion of Osgood's testimony did not ultimately affect Reed's substantial rights and does not require reversal. While we can foresee circumstances where a victim should testify or would willingly testify on behalf of a defendant at sentencing, the defendant should not be permitted to use a subpoena as a means of intimidating or harassing a victim.

VI. Improper Sentence

Finally, Reed claims that there is insufficient evidence to support the aggravating circumstances found by the trial court at sentencing and that the court failed to find that the aggravating circumstances outweighed the mitigating circumstances. In advancing these claims, Reed cites only one supporting authority, which relates to the trial court's failure to articulate its balancing of the aggravators and mitigators. *See Dixon v. State*, 685 N.E.2d 715, 717 (Ind. Ct. App. 1997). We note, however, that the trial court remarked, "On balance, I believe, what the legislature has provided for a Class C felony is the appropriate sanction in this case." Transcript of Evidence at 368. In other words, the trial court balanced the aggravators and mitigators and found them to be of equal weight.

> I don't know what's going to happen to you today. I do hope whatever happens will help you become a better person. I don't know how I feel about prison systems. I'm not sure if they help people or not. I hope if prison is the case, you learn that life is precious, and worth something. I ask the Court to be fair to you based on what's been heard. Please don't let your punishment break your spirit, and your hope for a better life. Think positive about how things can be for you when it's all over. Today is my birthday, and I'm happy to be alive to celebrate it. I'm going to make a conscious effort to close this chapter, and move on. I forgive you for what happened. I think that's a good place for both of us to start over.

Transcript of Evidence at 315-16.

"Sentencing decisions lie within the sound discretion of the trial judge, and we reverse only for an abuse of that discretion." *O'Neill v. State*, 719 N.E.2d 1243, 1244 (Ind. 1999). "[A] judge who imposes *the presumptive sentenc*e is under no obligation to explain his reasons through the delineation of the aggravating and mitigating circumstances." *Id*. (emphasis added); *cf. Thacker v. State*, 709 N.E.2d 3, 9 (Ind. 1999) (outlining requirements for sentencing statement where "a trial court uses aggravating or mitigating circumstances to *enhance or reduce* the presumptive sentence") (emphasis added). Here, the trial court elected to explain its reasons for imposing the presumptive sentence.

As previously mentioned, the trial court relied on unauthenticated documents in finding Reed's prior criminal history to be an aggravating factor. The remainder of the trial court's sentencing statement reads in relevant part as follows:

> The other aggravating factor that I should cite is that reducing the sentence – imposing a reduced sentence, because I had considered these situations here – this is a nonsuspendible of two years, with a presumptive of four years – and reducing it down anywhere below the presumptive, given the nature and circumstances of the crime – and I've already discussed those. The nature is that this was a shouting match, a pushing match, of – of blows being exchanged match. Mr. Reed was removed from the incident, and Mr. Morrissey was still on the stairs. Mr. Reed came back, and escalated it with this deadly weapon. So, the nature and circumstances of that particular event are an aggravator which prevents imposing a reduced sentence; having considered whether a reduced sentence under the presumptive would be appropriate. There are a – mitigators that were not cited by the Probation Department. First of all, Mr. Reed's youth, and conversely, although there were innuendos about his involvement, I take them just as that, and will cite that he has had a limited criminal history at this time. And I do believe, because we are in the business of rehabilitation, that with proper encouragement, and proper rehabilitation, that Mr. Reed – the character and the attitude that he exhibits today indicate that he is not likely to reoffend with the proper rehabilitation, and encouragement, and assessment now that he has come to the conclusion that he needs alcohol counseling.

Transcript of Evidence at 367-68. In its abstract of judgment, the trial court listed as aggravators Reed's prior criminal history; that imposition of a reduced sentence would depreciate the seriousness of the crime; and the nature and circumstances of the crime (specifically, that "there was a knife pushing matter").[12] Appellant's Appendix at 77. As mitigating circumstances, the trial court listed Reed's "youthful age"; his limited criminal history; and that Reed would not be likely to reoffend if given necessary counseling. *Id*.

Assuming, *arguendo*, that the trial court improperly found Reed's criminal history as an aggravator based on its consideration of unauthenticated documents, we "have the option to remand to the trial court for a clarification or new sentencing determination; to affirm the sentence if the error is harmless; and to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Holsinger v. State*, 750 N.E.2d 354, 363 (Ind. 2001). We opt for appellate reweighing here.

Although the trial court indicated that it found its stated aggravators and mitigators to be in equipoise, we cannot say that the mitigators clearly outweigh the remaining aggravators such that Reed's sentence must be reduced below the presumptive. The nature and circumstances of the crime are sufficiently serious to merit significant weight, as does the consideration that imposition of a reduced sentence would depreciate the seriousness of the crime. Reed re-entered the Rathskeller after being told to leave, brandished a knife, threatened to kill McMichael, and stabbed the unarmed Osgood in the chest, puncturing his

[12] Reed claims that the trial court discussed the nature and circumstances of the crime "only within the context of whether the court could impose a sentence below the presumptive sentence." Appellant's Brief at 21. As the abstract of judgment indicates, however, the trial court clearly found the nature and circumstances of the crime to be a separate aggravator. *See* Appellant's Appendix at 77.

lung. Given the seriousness and senselessness of the crime, we are not inclined to afford Reed's age and limited criminal history much weight, and we assign only moderate weight to the trial court's finding that Reed would not be likely to reoffend if given necessary counseling. We find that the aggravators are approximately balanced by the mitigators and therefore affirm Reed's four-year presumptive sentence.

Affirmed.

BARNES, J., concurs.

RILEY, J., concurs as to issues I, II, III, IV, and V and concurs in result as to issue VI.